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IN THE

Supreme Court of the United States

October Term, 1960

RUSSELL L. IRISH, dba
RUSSELL L. IRISH INVESTMENTS,
Petitioner,

vs.

SECURITIES AND EXCHANGE
COMMISSION,
Respondent.

No. 897

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit.

GRANT L. KIMER & RINER E. DEGLOW
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RAMONAL PRINTING CO.

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COMMISSION,
Respondent.

No.....

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on October 19, 1966.

OPINIONS BELOW

The Hearing Examiner filed a written opinion which was not reported and is printed in Appendix A hereto, p. 17. The SEC filed Findings, Opinion and Order which was not reported and is printed in Appendix A hereto, p. 39. The opinion of the Court of Appeals (App. B, p. 59) is reported at ..... F.2d .....

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1966 (App. B, p. 64). Timely petition for rehearing was filed November 15, 1966, and rehearing was denied November 25, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1). The Court of Appeals granted Petitioner until December 25, 1966, to petition for certiorari and file the same with the U. S. Supreme Court.

QUESTIONS PRESENTED

1. Whether the provisions of the 5th Amendment to the United States Constitution were violated when private proceedings were instituted on March 19, 1959, where Respondent issued an order, pursuant to § 15 (b) and 15A of the Securities Exchange Act of 1934 against the petitioner, Russell L. Irish, dba Russell L. Irish Investments, to determine whether Russell L. Irish and Russell Lawson Irish had wilfully violated § 17 (a) of the Securities Act of 1933 § 10 (b) of the Exchange Act, and Rule 17 CFR 240.15c 1-2

thereunder; wherein the Respondent ordered a private hearing held over a four-day period from September 21, 1959, through September 24, 1959. No recommended decision was made by the Hearing Examiner at that time.

A motion to reconvene the Hearing by the Respondent was made on October 23, 1963, which the Hearing Examiner denied and refused to certify such reconvening of the Hearing to the Respondent. On April 3, 1964 the Hearing Examiner issued his order recommending the proceedings against Petitioner be dismissed. On August 27, 1965, Respondent issued its order without a hearing which overruled the Hearing Examiner's recommended dismissal and revoked the Broker Dealer Registration of the Petitioner, Russell L. Irish and found Russell Lawson Irish as the cause of the revocation.

2. Whether the Respondent's Findings are supported by substantial evidence in that the Hearing Examiner in refusing to certify the reconvening of the hearing after a four-year delay of the private trial hearing of September 21, 1959, when he stated:

> "The long delay in bringing this case to the attention of the Hearing Examiner leaves him bereft of the opportunity of testing and passing upon the credibility of the various witnesses." (Tr. 1375-1395).

3. Whether the Commission by unduly delaying the proceedings violated its own Rules of Practice and Administrative Procedure Act, which violation

deprived the Petitioner of "Due Process of Law."

4. Whether the SEC violated due process of law and acted arbitrarily, capriciously and unjustly, when it entered its order suspending Petitioner from dealing in securities, when at almost the same time, on the same evidence covering the period of 1956 through 1962, the SEC reversed an Order of the National Association of Securities Dealers, Inc. (NASD) which had fined Petitioner $5,000.00 and suspended him from business for 30 days, and cancelled the fine by reducing it to censure only, holding that it was not in the public interest to allow the National Association of Security Dealers (NASD) to impose such penalties.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

THE ADMINISTRATIVE PROCEDURE ACT

5 U. S. C. Section 1009 (e) (p. 465)

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, @ 10, 60 Stat. 243.

SECURITY EXCHANGE RULES OF PRACTICE, 201.16 (e):

"Time for filing proposed findings and briefs prescribed by hearing officer. At the end of every hearing, the hearing officer shall, after consultation with the parties, prescribe the period within which such proposed findings and conclusions and supporting briefs are to be filed and shall direct such filing to be either simultaneous or successive, provided, however, that the period within which the first filing is to be made normally

should be no more than 30 days, and shall not exceed 60 days, after the close of the hearing. If successive filings are directed the proposed findings and conclusions of the moving party shall be set forth in serially numbered paragraphs and any counter-statement of proposed findings and conclusions must, in addition to any other matter, indicate as to which paragraphs of the moving party's proposals there is no dispute. Reply briefs may be filed by the moving party or, where simultaneous filings are directed, reply briefs may be filed by all parties, within the period prescribed therefor by the hearing officer."

SECURITY EXCHANGE RULES OF PRACTICE, 201.13:

"(a) Commission or hearing officer may extend, postpone or adjourn. Except as otherwise provided by law, the Commission at any time, or the hearing officer at any time prior to the filing of his initial decision or, if no initial decision is to be filed, at any time prior to the closing of the record, for cause shown, may extend or shorten any time limits prescribed by these rules for filing any papers and may postpone or adjourn any hearing."

"(b) Limitation on extensions. In no event shall any extension of time for filing papers granted by hearing officer pursuant to this rule exceed a total of 30 days.

"(c) Limitations on postponements and adjournments. A hearing before a hearing officer shall begin at the time and place ordered by the Commission, provided that, within the limits provided by statute, the hearing officer may for good cause postpone the commencement of the hearing for not more than 30 days or change the place of hearing. Any convened hearing may be adjourned

to such time and place as may be ordered by the Commission or by the hearing officer. It is the policy of the Commission that such adjournment shall be for not more than 30 days and in no event shall the hearing officer order an adjournment for a period in excess of 45 days."

STATEMENT

On March 19, 1959, the Respondent issued an order against Russell L. Irish, dba Russell L. Irish Investments, to determine whether Russell L. Irish and Russell Lawson Irish had wilfully violated § 17 (a) of the Securities Act of 1933; § 10 (b) of the Exchange Act and Rule 17 C.F.R. 240.10 b-5, and § 15 (c) (1) of the Exchange Act, and Rule 17 C.F.R. 240.15c 1-2. The purpose of the proceedings was to determine, after a private hearing, whether it was in the public interest to revoke or suspend the registration of Russell L. Irish, and whether to find Russell Lawson Irish a cause of any such order of revocation, suspension or expulsion, so as to bar Petitioner from being a broker and dealer in securities. No injunction was applied for nor secured by Respondent.

A private hearing was held over a four-day period from September 21, 1959, through September 24, 1959. At the close of the hearing no decision was made by the Hearing Examiner. Subsequently five depositions of various witnesses were taken in 1959, 1960 and 1961. No action was taken by Respondent in this matter until October 14, 1963, when Respondent filed a motion to reconvene the hearing. On October 23, 1963, the Hearing Examiner denied and refused to certify,

a reconvening of the hearing to Respondent. Petitioner then filed on November 4, 1963, its Motion for Stay of Proceedings Permanently.

On November 12, 1963, Respondent filed its application for review of the Hearing Examiner's Ruling of October 23, 1963, and its brief in support thereof and in opposition to Petitioner's Motion for Permanent Stay of Proceedings on Dismissal. On April 3, 1964, the Hearing Examiner issued his Order recommending that these proceedings against Petitioners be dismissed.

On August 27, 1965, the Respondent issued its Order overruling the Hearing Examiner's recommended decision and revoked Petitioner's registration as broker and dealer in securities. Petitioner then petitioned the Court of Appeals, to review the SEC's Order of Revocation.

On October 19, 1966, the Court of Appeals denied Petitioner's Petition for Review.

A Petition for rehearing of the Court of Appeal's Opinion was filed November 15, 1966, and was denied on November 25, 1966.

It should be noted also that at approximately the same time the NASD had considered evidence and exhibits pertaining to transactions of the Petitioner from 1956 through 1963. This same evidence of this period was considered by Respondents in its private hearings. The NASD entered an Order fining Petitioners the sum of $5,000.00, suspending Petitioner

from business for 30 days, and taxing costs at $2,310.95. On appeal by Petitioner, Respondent reduced and cancelled the $5,000.00 fine to censure only, and reduced costs from $2,318.95 to $500.00. (See App. A, p. 56).

The principal controversies are set forth herein in the Questions Presented in this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

The SEC violated Due Process of Law and acted unjustly, arbitrarily and capriciously when it reversed the Hearing Examiner's Recommended Decision and revoked Petitioner's registration as a broker-dealer of securities.

The Hearing Examiner when requested to enter a recommended decision had dismissed the Respondent's proceedings against Petitioner on the grounds that he could not make any findings of credibility of the witnesses. (App. A, p. 25), and found that it was not in the public interest to revoke petitioner's registration, also because of the long delay in the spasmodic prosecution of this case by Respondent.

The penalties meted out are so remote in time from the alleged violations as to constitute a taking of Petitioner's property and rights without due process. The very essence of justice has been denied when proceedings lie dormant over an interminable period of time, and the prosecutor then elects at his caprice

to obtain penalties on such long neglected charges. *Smith v. Illinois Bell Telephone Company*, 270 U.S. 587, 46 S.Ct. 407, 70 L.Ed. 747; *Deering-Milliken v. Johnston*, 295 F.2d 856; *Swift and Company v. U.S.*, 308 F.2d 849; *Amos Treat and Company v. Securities and Exchange Commission*, 306 F.2d 260, 113 U.S. App. D.C. 100; *Kessler v. FCC*, 326 F.2d 673, 117 U.S. App. D.C. 130.

It is well known that a person's business is a property right. *Truax v. Corrigan*, 1921, 22 S.Ct. 124, 257 U.S. 312, 66 L.Ed. 254; see also *Lasdon v. Hallihan*, 1941, 36 N.E. 2d 227; *Morland Theaters Corporation v. Portland Moving Pictures Machine Operators Protective Union*, 12 P.2d 333, 140 Ore. 35.

In addition, due process of law guarantees every person his day in court and requires orderly proceedings in accordance with generally established rules not violative of fundamental rights. The Petitioner has not been accorded orderly process and has been granted only inordinate delays. See *Rosenblum v. Rosenblum*, 42 N.Y.S. 2d 626, 181 Misc. 78.

It must be noted that the Respondent's own hearing examiner in his decision of October 23, 1963, refused to reconvene these hearings upon the request of the Respondent, stated:

> "Furthermore, the concept of fairness and due process require that proceedings such as these be prosecuted expeditiously and the hearing examiner is of the opinion that it will be unfair to the registrant (Appellant) and Russell Lawson

> Irish and the alleged 'cause' to resurrect this case after it has been in such inactive and dormant condition for so long." (Tr. 1082-1083).

The hearing examiner in his Recommended Decision of April 3rd, 1964, further stated that:

> "In view of the long delay and spasmodic prosecuting of this case, the hearing examiner is of the opinion that it cannot be seriously argued that public interest requires the revocation of Mr. Irish's registration. In his judgment, these proceedings should be dismissed." (Tr. 1375-1395). App. A. p. .....

That Respondent's Division of Trading and Markets is in violation of Respondent's Rules of Practice 201.16(e), and also in Failure to Provide Expeditious Proceedings Under Respondent's Rules of Practice 201.13 and 5 USCA 1009 (e).

Securities and Exchange Commission Rules 201.13 and 201.16 set time limits of 30 and 45 days for either continuation of hearings or filing of findings. Being valid rules of regulation by the Respondent, these are binding upon the Respondent. See *Accardi v. Shaughnessy*, 347 U.S. 260, 267; *Service v. Dulles*, 354 U.S. 363; *Sangamon Valley Television* v. U.S., 269 F.2d 221; *Jefferson Amusement Company v. FCC*, 226 F.2d 277; *American Broadcasting v. FCC*, 179 F.2d 437; *Sheridan-Wyoming Coal v. Krug*, 172 F.2d 282.

The Respondent's Division of Trading and Markets cannot now assert some other construction of the Commission rules due to present circumstances which would change their clear intent. *U.S. v. Missouri-Pa-*

cific Railroad Company, 278 U.S. 269. (The Court held that administrative usage must be uniform and of long standing in order to allow administrative construction to vary unambiguous regulatory provisions).

The Respondent has failed to follow the Administrative Procedures Act relative to delay. Under 5 USCA 1009(e) the Courts have held that even if the general procedural rule of an agency is otherwise, and does not provide a time limitation to guide the Hearing Examiner, statutes cited will control. *Deering-Milliken v. Johnson*, 295 F.2d 856.

The Supreme Court has rejected any narrow interpretation of the effect of the Administrative Procedures Act. *Riss and Company v. U.S.*, 341 U.S. 907; *Cates v. Haderlein*, 342 U.S. 804.

The policy of the Administrative Procedures Act has already been adopted by the Commission in the case of *In re Engineering Public Service*, 10 Sec 327. Its spirit of fairness was followed by the Commission even earlier. *In re Consumer Power*, 6 Sec 444. Unreasonable delay easily gives rise to violations of due process of law as in the instant appeal. It is this high standard which is the policy of the Administrative Procedures Act. Swartz, "A Decade of Administrative Law: 1942-1951," 51 Mich. L. Rev. 775, 791-3 (1950). This is a part of Securities and Exchange jurisprudential traditional.

The recommended decision of the Hearing Examiner of April 3, 1964 (Tr. 1375-1395) App. A in ef-

fect held the Respondent guilty of laches and failure to extend due process to the Petitioner.

Section 201.13 of the Respondent's own rules states as follows:

> ". . . It is the policy of the Commission that such adjournment shall be for not more than 30 days and in no event shall the Hearing Officer order an adjournment for a period in excess of 45 days." (Emphasis ours).

This very rule strikes the heart of this issue. The commission's staff proposed on October 14, 1963 (Tr. 1077-1081), to reconvene these proceedings which had been closed four years and one month after their adjournment. These proceedings were closed subject only to the taking of several depositions, of which the last was taken on April 5, 1961.

The instant proceedings covered a period from 1941 to the time of the 1959 hearing, and included records not required to be held by the very rules and regulations of the Securities and Exchange Commission.

This action of the Commission is a death sentence of a quasi-criminal proceeding, where credibility is of outright necessity in order for any court or examiner to find the required evil intent. The examiner, who at least had held the hearing and had seen the witnesses, could not make any findings of credibility of the trial-hearing witnesses which had taken place four years prior. Certainly to prove wilfulness to violate the law, credibility is the vital issue.

The findings of the examiner, like a District Court,

cannot be overturned by the Court of Appeals unless the findings are clearly erroneous, and must be reinstated by this Court on appeal unless clearly wrong. In making this examination the Court of Appeals can look only to evidence most favorable to the District Court's (Hearing Examiner's) findings. *Lewis Maeh Co. v. Aztec Lines*, 172 F.2d 746, and in determining whether a trial court's findings are clearly erroneous, due regard must be given to a trial court's opportunity to observe witnesses and judge their credibility. *Kalo Inoculant Co. v. Funk Bros. Seed Co.*, 161 F.2d 981, reversed 333 U.S. 127, 92 L.Ed. 588.

The rule that fact findings shall not be set aside unless clearly erroneous, and that master's findings shall be considered as findings of the court, should be followed in all cases, but particularly where there is a great volume of highly conflicting testimony, and the master who had *advantage of seeing and hearing witnesses is a highly trained lawyer of wide experience.* (Emphasis supplied).

Stonega Coke & Coal Co. v. Price, 106 F.2d 411, 84, L.Ed. 516.

Certiorari denied 308 U.S. 618:

". . . whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they "must be treated as unassailable." *Davis v. Schwartz*, 155 U.S. 631, 636, 15 S.Ct. 237, 39 L.Ed. 289; *Adamson v. Gilliland*, 242 U.S. 350, 353, 37 S.Ct. 169, 61 L.Ed. 356; *Alabama Power Co. v. Ickes*, 302 U.S. 464,

> 477, 58 S.Ct. 300, 82 L.Ed. 374. The reason for this is obvious and has been repeated over and over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds. *Morris Plan Industrial Bank v. Henderson*, 2 Cir., 131 F.2d 975, 977."

Certainly the Commission, if fairness is the rule, must give the same credit to the findings of the examiner of this cause, or Petitioner's rights secured under the Fifth Amendment will be clearly abridged, and held to be of little value.

Certainly no court can claim substantial justice has been correctly accomplished, when the fact finder, because of a four and a half year delay, from trial to the date of findings, can not determine credibility of the trial hearing witnesses. App. A, p. 25.

The only person judicially involved in this matter, who had the opportunity to see and hear the witnesses was the William W. Swift, the hearing examiner. And he stated unequivocally:

> "It will be unfair to revoke the registrant's registration on a record that has become as stale as this and he finds that the public interest does not require it." (App. A, p. 37).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of

RUSSELL L. IRISH, dba
RUSSELL L. IRISH INVESTMENTS
1016 Old National Bank Building
Spokane, Washington 99201

File No. 8-2118

RECOMMENDED DECISION

(Private Proceeding)

APPEARANCES:

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of Mortimer & Prescott
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Seattle, Washington
appeared for the registrant and
Russell Lawson Irish, as did
John F. Campbell, Esq.

John N. Fegan, Edward B. Wagner and
Francis X. Kelly, Esqs.
appeared for the Division of Trading
and Markets

BEFORE: WILLIAM W. SWIFT, Hearing Examiner
Washington, D.C., April 3, 1964

Filed April 3, 1964 SEC.

PROCEEDINGS

These private proceedings were instituted on March 19, 1959 when the Commission issued an order, pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") against Russell L. Irish, dba Russell L. Irish Investments (hereinafter sometimes referred to as "the corporation"), to determine whether the statements set forth in Section II thereof are true; and to determine whether Russell L. Irish doing businss as Russell L. Irish Investments, a sole proprietorship, (hereinafter sometimes referred to as "registrant"); and Russell Lawson Irish (hereinafter referred to as "Irish"), have wilfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 17 CFR 240.10b-5 thereunder; and Section 15(c)(1) of the Exchange Act and Rule 17 CFR 240.15c1-2 thereunder. Furthermore, whether, pursuant to Section 15(b) of the Exchange Act it is in the public interest to revoke the registration of registrant; whether, pursuant to Section 15(b) of the Exchange Act, pending final determination of the question of revocation, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of registrant; whether, pursuant to Section 15A(1)(2) of the Exchange Act, it is necessary or appropriate in the public interest or for the protection of investors, or to carry out the purposes of said section, to suspend registrant for a period not exceeding twelve (12) months or to expel registrant from membership in the Na-

tional Association of Securities Dealers, Inc.; and whether, within the meaning of Section 15A(b)(4) of the Exchange Act, the above named Russell Lawson Irish (Irish) is a cause of any order of revocation, suspension or expulsion which may be entered in these proceedings.

The aforesaid order, issued March 19, 1959, ordered that a private hearing be held for the purpose of taking evidence on the foregoing questions, as set forth in Section IV thereof at a time and place to be designated, by further order. An amending order was issued by the Commission in these private proceedings on August 27, 1959 which amended Section II of the original order of March 19, 1959 by adding thereto a new paragraph designated as F and reading as follows:

> "F. During the period from approximately May 27, 1959 to the date hereof, registrant has refused to make his books and records available for reasonable periodic, special and other examination by members of the staff of the Commission."

The said amending order further amended the said original order by adding to Section III thereof a new paragraph designated as D and reading as follows:

> "D. Registrant wilfully violated Section 17(a) of the Securities Exchange Act of 1934 in that registrant has not permitted inspection of his books and records by representatives of the Commission."

The said amending order still further amended Section IV of the original order for private proceedings by changing the designation of paragraphs (e), (f), (g),

and (h) to (f), (g), (h), and (i), respectively, and by adding a new paragraph (e), reading as follows:

> "(e) Whether registrant has wilfully violated Section 17(a) of the Securities Exchange Act of 1934."

The said amending order of August 27, 1959 directed that a private hearing be held at 10 o'clock A. M. on September 21, 1959 in the Commission's Seattle Regional Office, Room 304, 905 Second Avenue Building, Seattle 4, Washington before the undersigned as Hearing Examiner. By an order issued on September 1, 1959 the Commission changed the place of the hearing to Federal Court Room No. 306, Postoffice Building, Spokane, Washington, the date of the hearing being kept at 10 A. M. on September 21, 1959.

A further amending order was issued by the Commission on September 17, 1959 which added to paragraph B of Section II of the original order, the one issued March 19, 1959, an additional subparagraph (c) reading as follows:

> "(c) sold to customers mutual fund shares at prices in excess of the current public offering price described in the prospectus in effect at the time of such sales."

The hearing in these private proceedings was commenced by the undersigned as Hearing Examiner, as directed by the Commission, in Spokane, Washington on September 21, 1959. It ran for four consecutive days and was closed on September 24, 1959, subject

to the taking and filing of such depositions, as either side should want. A recommended decision by the Hearing Examiner was requested (Tr. p. 469).[1]

Although the Hearing Examiner was unaware that some depositions had been taken and filed in these proceedings subsequent to September 24, 1959, the aforesaid date upon which the hearing was closed, until the Division of Trading and Markets filed on October 14, 1963 its Motion to Reconvene the Hearing, it appears that the deposition of Therese W. Benedict was taken, by consent of counsel for the parties, in San Francisco, California on December 3, 1959, the same being filed in these proceedings on December 24, 1959; that the deposition of Evan I. Evans was taken in similar fashion in Spokane, Washington on June 20, 1960, the same being filed in these proceedings on July 6, 1960; that the deposition of Louis E. Alboucq was taken on February 24, 1961 in Spokane, Washington under similar conditions, which was filed in these proceedings on March 9, 1961; that the deposition of William A. Curry was taken, under similar conditions, on April 5, 1961 in New York, New York, the same being filed in these proceedings on April 27, 1961; and that the deposition of Daniel C. Raffaele was similarly taken on April 5, 1961 in New York, the same being filed in these proceedings on April 17, 1961.

As heretofore mentioned, the Division of Trading

[1] The following designations are used in this Recommended Decision: Division's exhibits as ("DX____"); Registrant's Exhibits as ("RX____") and Transcript of Testimony as ("Tr.____").

and Markets on October 14, 1963 filed a Motion to Reconvene the Hearing in these proceedings which the Hearing Examiner, by order dated October 23, 1963, for the reasons therein set forth, denied and orally refused to certify such ruling to the Commission with the result that counsel for registrant and Russell Lawson Irish filed in these proceedings on November 4, 1963 a document which is captioned: "MOTION FOR STAY OF PROCEEDINGS PERMANENTLY, OR IN THE ALTERNATIVE, MOTION TO DISMISS PROCEEDINGS AND MOTION FOR LEAVE TO ARGUE SAME ORALLY BEFORE THE COMMISSION".

On November 12, 1963, counsel for the Division of Trading and Markets filed a document herein which is styled "APPLICATION FOR REVIEW OF HEARING EXAMINER'S RULING ON OCTOBER 23, 1963 AND BRIEF IN SUPPORT THEREOF AND IN OPPOSITION TO RESPONDENTS' MOTION FOR A PERMANENT STAY OF THE PROCEEDINGS OR DISMISSAL" whereupon counsel for registrant and Russell Lawson Irish, on November 22, 1963 filed a reply brief in support of the Hearing Examiner's ruling and in support of respondents' motion for a permanent stay or dismissal of this proceeding, which reply brief included an affidavit of service executed by Merle Elaine Sand and a controverting and supplemental affidavit of T. Dan Mortimer.

The Commission, upon consideration of these docu-

ments, issued its order or memorandum, dated December 12, 1963 which denied the aforesaid motion for a permanent stay or dismissal of the proceedings and the request for oral argument. Furthermore, in order to avoid the necessity of reconvening the hearing, as requested by its staff, the Commission directed that the hearing be deemed closed and it fixed periods for the filing with the Hearing Examiner of proposed findings and supporting briefs, including a reply brief by the staff within ten days after the receipt of registrant's filing.

In due time the staff filed proposed findings of fact, conclusions of law and a brief in support thereof, including Appendices I, II and III to their proposed findings of fact and conclusions of law. Within the time allowed, proposed findings of fact, conclusions of law and brief in support thereof were filed herein on March 2, 1964 by Mr. Mortimer on behalf of the registrant and Russell Lawson Irish.

Thereupon, and in due time, a reply brief was filed on March 12, 1964 by counsel for the Division of Trading and Markets. The said documents, constituting the proposed findings of fact and conclusions of law submitted to the Hearing Examiner by counsel for both sides, along with their respective briefs, have been given due consideration by the undersigned in the preparation of this Recommended Decision.

The entire record in these proceedings having been served upon him for the preparation of a Recom-

mended Decision, the Hearing Examiner now submits his Recommended Decision.

STATEMENT OF THE CASE

Russell L. Irish, doing business as Russell L. Irish Investments, a sole proprietorship, referred to herein as "the registrant", filed an application for registration as a broker-dealer pursuant to Section 15(b) of the Exchange Act, which registration became effective on February 26, 1945 and is still in effect (File No. 8-2118). The registrant is a successor to a corporation incorporated in the State of Washington as Russell L. Irish Investment Corporation, hereinafter referred to as "the corporation" which filed an application for registration as a broker-dealer pursuant to Section 15(b) of the Exchange Act on April 13, 1942, which registration became effective on May 13, 1942, said registration being withdrawn on April 18, 1945. Russell L. Irish was the president, director and owner of 90% of the capital stock of said corporation (File No. 8-1).

On September 26, 1950, the registrant filed an amendment to its application for registration disclosing that Russell Lawson Irish is a salesman of the registrant and has been employed as a salesman for the registrant proir to September 26, 1950 (File No. 8-1; File No. 8-2118; Tr. p. 156-157).

The Commission's aforesaid order for private proceedings, issued on March 19, 1959, under Section II

thereof, amended in the particulars hereinbefore mentioned, specified the issues which are presented for determination. A review of the evidence pertaining to these issues will now be undertaken.

FINDINGS OF FACT

When the hearing in these proceedings was closed on September 24, 1959, under the conditions hereinbefore mentioned, the Hearing Examiner had the impression that the Division's case against the respondents was, indeed, weak. This is about the only recollection he has of the four days of hearings which he conducted on September 21 through September 24, 1959. He does not recall the demeanor of any of the witnesses who appeared on the witness stand and he doubts very much that he would be able to recognize the respondents, both of whom testified, should our paths again cross.

The long delay in bringing this case to the attention of the Hearing Examiner leaves him bereft of the opportunity of testing and passing upon the credibility of the various witnesses. Indeed, these proceedings come before him for the preparation of a recommended decision upon the cold record, such as the Commission will have before it, when the case ultimately reaches them.

Under these handicaps, the Hearing Examiner has carefully and studiously read the transcripts of testimony, as well as the five depositions, above referred to, which were taken subsequent to September 24,

1959, when the hearing was closed. He has also considered the numerous exhibits which were introduced and the entire record.

With such conditions confronting him, the Hearing Examiner turns to a review and discussion of the evidence pertaining to the various issues embraced in the Commission's order of March 19, 1959, as amended.

> Allegations relative to use of the mails and instrumentalities of interstate commerce embraced in paragraph D of Section II and paragraphs B and C of Section III relative to the conduct of registrant's business.

At pages 41 and 42 of the transcript, a stipulation of sorts was entered into but counsel for the registrant refused to include in such stipulation the words "inducing the purchase and sale of securities" as embraced in said paragraph B (Tr. p. 42).

However, the Hearing Examiner finds, as a fact, that there is abundant evidence in this record that the United States mails and other means and instrumentalities of interstate commerce, such as the telephone, were constantly used by the registrant, aided and abetted by registrant's son, Russell Lawson Irish, in the conduct of the business operations of the registrant as depicted in paragraph D of Section II and paragraphs B and C of Section III.

> Alleged refusal of registrant "to make his books and records available for reasonable periodic, special and other examination by members of the staff of the Commission" as set forth in paragraph

F to Section II in the amending order of August 27, 1959.

Mr. H. Clair Miller, who died after this record was closed on September 24, 1959, testified that he and Mr. Fegan visited the office of the registrant on or about May 27, 1959 for the purpose of demanding an opportunity to inspect registrant's books and papers with the result that, after conferring with his counsel, the registrant agreed that access would be given to registrant's books and records as they stood at that time and only for the purpose of determining the financial condition at that moment. This did not suit Mr. Miller and Mr. Fegan (Tr. pp. 6-11).

When questioned about the joint demand made by the late Mr. Miller and Mr. Fegan, the registrant gave the following version of what transpired:

> "Q. In paragraph two of the order, amending the order, setting date and place, and so forth, under paragraph two, sub-section F, the pleadings read 'During a period from approximately May 27, 1959, to the date hereof, Registrant has refused to make his books and records available for the reasonable periodic, special and other examination by members of the staff of the Commission'. Could you state whether or not there have been any other requests of any type whatsoever made by the members of the staff of the Commission since May 27, 1959, to date, for the purpose of inspecting the books and records other than these proceedings?
>
> A. If I understand your question - -
>
> Q. (Interrupting) Has the Commission ever asked to see your books and records since May 27th?

A. No."

(Tr. p. 401)

This record discloses that the registrant, ever since the year 1945 (Tr. pp. 307-308) has been submitting books and records for the examination of the Commission's staff from time to time and that many of the exhibits admitted in evidence are the result of those examinations.

Furthermore, shortly after the hearing was convened, counsel for the Division sought to introduce 13 exhibits in photostatic form of certain ledger sheets, the originals of which the registrant had submitted covering the account of 13 substantial customers of registrant. Registrant's counsel strongly objected to the admission of these exhibits on the ground that records older than six years are irrelevant, citing Rule 17a-3 and Rule 17a-4, the latter requiring the preservation of records of broker-dealers, subject to Rule 17a-3, for a period of not less than six years, the first two years in an easily accessible place.

While the Hearing Examiner had misgivings as to the soundness of his action which he expressed at the time (Tr. pp. 29-30), he overruled the objections and admitted Division's Exhibits 1 through 13, inclusive, in evidence. Those misgivings still exist.

Immediately after the admission of Division's Exhibits 1 through 13, inclusive, the precise questions arose over the applicability of Rule 17a-3 and 4 with respect to a subpoena duces tecum which had been

served upon the registrant requiring the production of certain records at the hearing (Tr. pp. 30-35). A ruling on these objections was obviated when it was stipulated, in effect, that the entries in the records produced under such subpoena duces tecum did not cover a period prior to March, 1953 (Tr. p. 35). Taking the record as a whole, the Hearing Examiner finds that the evidence is insufficient to support a finding that the registrant, during the period from approximately March 27, 1959 to August 27, 1959, refused to make his books and records available, as charged in paragraph F to Section II of the amending order, dated August 27, 1959.

Alleged violations embraced in Paragraph B(b) of Section II including subparagraph (c) which was added by the amendment of September 17, 1959.

The charges directed against the registrant and his son, Russell Lawson Irish, by the paragraphs mentioned under this sub-title, relate to an alleged series of transactions in mutual funds that are said to have taken place in a period of time extending from approximately May 1, 1943 to approximately October 21, 1958. The 13 accounts which, as mentioned above, were covered by Division's Exhibits 1 through 13, inclusive, were the ones principally involved and were inquired into specifically in the testimony, ostensibly because those accounts represented substantially large investments as distinguished from some eighty-seven other customers who had smaller investments (Tr. p. 422).

The 13 customers whose accounts were inquired into were Harry A. Boger, Harry N. Boger, Dr. Milo Harris, O. George Wagnild, Maurice D. Prince, Louis E. Albouca, Evan I. Evans, Mrs. Therese W. Benedict, Mr. and Mrs. Robert F. Brauer, Fred H. Senkler, Johnnie R. Hughes, Jacob C. Keller, and August J. Pfeiffer.

According to the Hearing Examiner's perusal of the evidence, it appears that most of the transactions inquired into by counsel occurred more than five years before these proceedings were instituted on March 19, 1959. When Mr. Irish, Sr. was being interrogated by Mr. Fegan, Division's counsel, about Division Exhibits 1, 2, 4, 6, and 7, which are ledger sheets for the accounts of Harry A. Boger, Harry N. Boger, Louis Albouca, Evan I. Evans and Dr. Milo Harris, it is to be noted that Mr. Irish pleaded "this is eight years ago approximately that I would have to recall all the reasons at that time, but diversification was uppermost. * * *" (Tr. p. 112).

Again at the bottom of the same page—page 112 of the transcript—the following question was propounded which was answered by Mr. Irish, Sr. as follows:

> "Q. Would you say Mr. Albouca decided and that he wanted more funds for his money than Mr. Boger in their discussions with you?
>
> A. You're asking me to recall something that I can't recall because it's so long ago.
>
> Q. You don't recall?

A. I don't recall. All points were discussed, however, with the client."

(Tr. pp. 112-113)

Most, if not all, of the transactions relative to the alleged "break point" violations occurred before February 25, 1954 when the registrant addressed its letter to Distributors Group, Inc. (RX 5), several of them being as far back as January, 1951, when one of the Albouq transactions took place (Tr. p. 71) involving some twelve different funds in the amount of $91,000, and one of Evan I. Evans' transactions which took place on August 3 and August 23, 1950 (Tr. p. 73) involving an aggregate of $30,820, followed a little later by the Maurice D. Prince transactions dated January 4, 1951, three others on January 8, 1951 and a fourth on January 11, 1951 (Tr. pp. 65, 66, 67).

In his testimony, Mr. Irish, Sr., with respect to the "break point" reductions, when questioned by Mr. Fegan with respect to the transactions dated June 7 and 9, 1954, wherein he sold securities to Mr. Harry A. Boger aggregating $29,084 (Tr. pp. 52-53) said that his understanding when those combined transactions took place that it would not have been possible for Mr. Boger to receive a "break point" reduction (Tr. p. 53). Later on, when Mr. O'Reilly brought the question as to "break point" reduction to his attention, Mr. Irish testified that he checked the matter with a Mr. Burgess, of San Francisco, who was the western coast representative of Group Securities, who told Mr. Irish "Yes, you can combine the classes" (Tr. p. 55).

However, Mr. Irish, Sr., according to his testimony, did not reimburse his customers in cases where they had been charged above the reduced rate (Tr. p. 55).

It should at this point, however, be recalled that Mr. Irish, Sr., when under examination by his own counsel, testified that he did not attempt any refunds because at the time the break point advantages were called to his attention he, Irish, was "being seriously examined" he decided "to see the outcome of this thing" (meaning these proceedings) before, upon advice of counsel, making any refunds (Tr. pp. 344-345). Neither has Distributors Group, Inc. ever refunded the difference to the customers who were entitled to these concessions (Tr. p. 353).

Despite the failure of these customers to receive the refunds to which is appears they were entitled, it is to be noted that registrant's customers have stood behind him and appeared to be satisfied.

Due to the admissions of Mr. Irish, Sr., just recounted, that certain of his customers were entitled to the break point reductions and that no refunds have been made because of the overcharges, the Hearing Examiner is of the opinion that the weight of the evidence preponderates in favor of the Division's contentions with respect to mutual fund transactions.

Allegations embodied in Paragraph B(a) of Section II

These allegations read as follows:

"(a) induced such customers to engage in trans-

actions of purchase and sale in such securities which were excessive in size and frequency in the light of the character of said accounts."

Interspersed with the transactions involving mutual funds and the break point concessions were other transactions which relate to switches, excessive trading (churning) and reinvestments such as those referred to on page 370 of the transcript and which Mr. Fegan interrogated Mr. Irish, Sr. about at page 452, the following testimony being adduced:

"Q. Checking my records, Mr. Irish, I found that those transactions that I was referring to took place in January and February of 1957, and my question was whether, in connection with that move into the Future Planning Corporation Fund plan that you discussed with the Fund officials of Group Securities or National Securities?

A. No, I did not.

Q. Then, the records in evidence here, they're not complete in this exhibit - -

Hearing Examiner: (Interrupting) Now, what exhibit is that you're referring to?

Mr. Fegan: Not contained in Exhibit 22 - - indicate that in October of 1957, there was a liquidation of the shares of Future Planning Corporation of the plans through Knickerbocker through Manufacturers Trust Company, and the reinvestment program of Mr. Boger, Harry A. Boger, Harry N. Boger, Mr. Brauer, Mr. Evans, Mr. Prince in National Securities Growth series and National Securities Dividend series, do you recall that?

A. Yes, I do."

(Tr. pp. 452-453)

Mr. Irish, Sr. admitted that the move into Future

Planning Securities was "to obtain a tax shelter" and that the move provided a "defensive character marketwise" (Tr. p. 453).

Based upon testimony of this character and the circumstances surrounding those and similar transactions, the Hearing Examiner is convinced by a preponderance of the evidence that violations of the type alleged in Paragraph B(a) of Section II, quoted above, took place.

CONCLUSIONS OF LAW

Based upon the entire record in these proceedings, and particularly his review and discussion of the evidence and testimony appearing herein on pages 12 to 16, the following conclusions of law are reached by the Hearing Examiner:

(1) He finds that the allegations set forth in Section II of the Commissioner's order for private proceedings, issued on March 19, 1959, as amended, with the exception of paragraph F, which has hereinbefore been rejected, are true; and

(2) That during the period from approximately May 1, 1943 to approximately October 31, 1958, the registrant, aided and abetted by his son, Russell Lawson Irish, in the particulars set forth in Section II of the order of March 19, 1959, as amended, except said Paragraph F thereof, wilfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 17 CFR 240.10b-5 thereunder;

Sections 15(c)(1) of the Exchange Act and Rule 17 CFR 240.15c1-2; and Section 17(a) of the Exchange Act.

PUBLIC INTEREST

As heretofore noted, the order instituting these private proceedings was issued by the Commission on March 19, 1959 and alleged that the registrant did the things charged against him during a period from approximately May 1, 1943 to approximately October 31, 1959. Some sixteen years later, the hearing under that order was commenced on September 21, 1959 and was closed four days later, on September 24, 1959, subject to the filing by either side of any depositions or interrogatories of witnesses who were then available.

Four and a half years have passed since the hearing was closed, under the conditions just mentioned. Yet the record as submitted to the Hearing Examiner for the preparation of this Recommended Decision is silent as to how the registrant has been conducting his business since then, or even if he is still in business.

Has the registrant continued conducting his business in the manner which provoked the institution of these proceedings? Has he "gotten religion", turned over a new leaf and mended his ways of conducting his business? Is he now conducting his business in accordance with S.E.C. regulations and the National Association of Securities Dealers' Rules of Fair Practice

which requires the observance of high standards of commercial honor and just and equitable principles of trade? The Hearing Examiner regards these as being pertinent questions.

Since this record contains no disclosures as to what the attitude of the registrant had been since this record was closed on September 24, 1959, the presumption is that the registrant's conduct has been good and all that it should be.

In view of the long delay in the spasmodic prosecution of this case, the Hearing Examiner is of the opinion that it cannot be seriously argued that the public interest requires the revocation of Mr. Irish's registration. In his judgment, these proceedings should be dismissed.

This Commission has decided three cases which, in some degree, are applicabel here: The first is *Howard F. Hansell, Jr.*, 31 S.E.C. 393 where the application for registration had been enjoined ten years previously. The second is that of *Herbert A. Mendell, doing business as Herbert A. Mendell Co.*, 31 S.E.C. 491 where the injunction had been issued twelve years previously and the third is that of *Wesreb Oil Company* (Securities Act Release No. 4647), such release being dated September 30, 1963.

The following excerpt is taken from the Commission's opinion in the *Hansell* case, *supra:*

> "Under all the circumstances, including the lapse of time since the entry of the injunction decree

and Hansell's apparent good record since then, we do not deem it in the public interest to deny this application."

From the opinion in *Wesreb Oil Company* case, *supra*, the following excerpt is quoted:

"* * * We agree with the Hearing Examiner that in view of all the circumstances, *including particularly the long lapse of time*, (emphasis supplied) that a proper exercise of our discretion does not require that a permanent suspension be entered or that Wesreb be barred from the use of Regulation A."

Based upon the entire record in these proceedings, the Hearing Examiner is firmly of the opinion that it will be unfair to revoke the registrant's registration on a record that has become as stale as this and he finds that the public interest does not require it. If the registrant still continues his wrongful conduct, the Division of Trading and Markets can resort to the courts through the injunctive process or it can seek another order for proceedings from the Commission alleging new and later violations than those embodied in the extensively amended order under which these proceedings have been spasmodically kept alive for so long a time.

RECOMMENDATION

In view of his foregoing comments under the subtitle PUBLIC INTEREST, the Hearing Examiner recommends that these private proceedings be dismissed.

Any and all proposed findings submitted by the parties which have not been given or in some measure covered by the foregoing findings, are refused as being inconsistent with this Recommended Decision or unsupported by substantial evidence.

Respectfully submitted,

WILLIAM W. SWIFT,
Hearing Examiner

Washington, D. C.
April 3, 1964.

APPENDIX A

(Securities Exchange Act Release No. 7687)

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C.

August 27, 1965

In the Matter of RUSSELL L. IRISH doing business as RUSSELL L. IRISH INVESTMENTS 1016 Old National Bank Building Spokane, Washington File No. 8-2118 Securities Exchange Act of 1934— Sections 15(b) and 15A	FINDINGS, OPINION AND ORDER REVOKING BROKER-DEALER REGISTRATION AND EXPELLING FROM REGISTERED SECURITIES ASSOCIATION

BROKER-DEALER PROCEEDINGS

Grounds for Revocation of Registration

Grounds for Suspension or Expulsion from Registered Securities Association

Excessive Trading in Mutual Fund Shares

Sales of Mutual Fund Shares at Prices above Offering Price

Sales of Mutual Fund Shares in Amounts Below Break Points

Where registered broker-dealer induced purchases and redemptions of mutual fund shares in accounts of customers which were excessive in size and frequency in view of character of such accounts; effected sales of such shares at prices which, because of failure to reflect reduction in sales load on purchases at or above

break-point amount, exceeded current offering price; and sold such shares to customers in amounts slightly below break-point amount or effected several sales to a customer or his family which could have been combined to exceed break-point amount, without effectively disclosing savings available to customers, *held*, willful violations of anti-fraud provisions of Securities Acts.

PUBLIC INTEREST—DELAY IN PROCEEDINGS

Where *four years* elapsed between close of hearings and *commencement of post-hearing procedures*, but registrant contributed to delay, failed to take any steps to expedite proceedings, and was not prejudiced by delay because proceedings were private and registrant continued to do business, *held*, dismissal of proceedings not warranted, and under all the circumstances, including extensive fraudulent conduct, appropriate in public interest to revoke registrant's broker-dealer registration and expel registrant from membership in registered securities association.

APPEARANCES:

John N. Fegan, Edward B. Wagner and *Francis X. Kelly*, for the Division of Trading and Markets of the Commission.

T. Dan Mortimer, of Mortimer & Prescott, for Russell L. Irish, doing business as Russell L. Irish Investments, and Russell Lawson Irish.

Russell L. Irish, now doing business as Russell L. Irish Investments ("registrant"), has been registered as a broker and dealer since 1942, is a member of the National Association of Securities Dealers, Inc. ("NASD"), and specializes in the retail sale of mutual fund shares. In March 1959, private proceedings were instituted to determine whether, pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act"), registrant's registration should be revoked, whether he should be suspended or expelled from the NASD, and whether his son, Russell Lawson Irish ("Irish, Jr."), who was employed as a salesman, should be found a cause of any such action.

Following hearings and the taking of depositions, our Division of Trading and Markets ("Division") and respondents filed proposed findings and briefs. The hearing examiner submitted a recommended decision in which he found certain willful violations as alleged in the order for proceedings as amended, but he recommended dismissal of the proceedings because of the lapse of time since the hearings were closed in 1959 *and the lack of information in the record as to whether or how registrant had conducted business in the interval.* The Division and respondents filed exceptions, and the Division filed a supporting brief.[1] Our findings are based upon an independent review of the record.

[1] Respondents did not file a brief in support of their exceptions to the hearing examiner's findings of violations. Under Rule 17(b) of our Rules of Practice then in effect, "any exceptions not briefed may be regarded as waived." However, we have determined to consider the merits of the issues raised.

EXCESSIVE TRADING

From September 1953 through October 1958, registrant, contrary to the customers' best interests and for his own gain, induced purchases and redemptions of mutual fund shares in the accounts of customers which were excessive in size and frequency in the light of the character of such accounts.[2]

The transactions analyzed were effected in the accounts of registrant's nine biggest customers.[3] Six of the customers were or had been farmers, one had been a widow for many years, one was a physician and one an accountant. The accountant had agreed to have Irish, Jr. handle his account because the latter was a fraternity brother of his sons. The physician was a customer of long standing, one of the farmers had given registrant financial assistance, and both were personal friends of registrant. All the customers generally followed registrant's recommendations. Respondents contend that the occupations and asserted substantial wealth of these customers show that they were sophisticated investors. However, the extent of the customers' reliance on registrant and acceptance of his recommendations, as well as the very nature of their transactions, tends

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[2] The order for proceedings charged registrant with violations beginning in 1943, but evidence was introduced only for this shorter period.

[3] From 1954 through October 1958, registrant's gross commissions on sales to over 100 customers totalled $212,038, of which more than 50% was derived from its sales to the nine customers involved.

to establish the contrary.[4]

During the period in question, registrant followed a policy of recommending to customers that they redeem the shares of one mutual fund and use the proceeds to buy those of another fund, or shift from one series to another series of the same mutual fund, which transactions required the payment of a new sales commission. Thus, the accountant-customer purchased $214,459 of mutual fund shares in 16 transactions of which 14 occurred in the course of switches from other fund shares.[4a] The physician effected 21 purchases totalling $344,111, of which 12 occurred in switches. The widow, during the 27-month period during which her account was active, effected 6 purchases for $46,588, of which 4 were in switches. One of the farmer-customers purchased $395,226 of mutual fund shares in 27 transactions, of which 19 occurred in switches. The other five customers effected 16, 17, 20, 33 and 35 purchases, of which 8, 11, 8, 14, and 16, respectively, were in switches.

Not only was there excessive switching between mutual funds, but switches were in many instances effected after the first fund had been held in the customer's

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[4] Cf. R. H. Johnson Co., 36 S.E.C. 467, 485 (1955), aff'd 231 F.2d 523 (C.A.D.C. 1956), cert. denied 352 U.S. 844; Mason, Moran & Co., 35 S.E.C. 84, 89-90 (1953); Looper and Company, 38 S.E.C. 294, 296-97 (1958).

For example, the accountant-customer, who was employed as the office manager for a local oil company, in response to a question as to whether he had any particular reason for dividing an investment of approximately $36,000, made within a period of one week, among shares of several mutual funds testified: 'No, it was simply because Mr. Irish made the proposition and since he's in the business, and I am not, I took his word for it that it was the thing to do." He further testified that he did not indicate a preference for any of the funds described to him by registrant because he was "not acquainted at all with funds."

Another customer, a farmer and retired storekeeper, testified that he did not know anything about the funds (including six series of one and four series of another) in which he invested about $91,298 upon registrant's recommendation during a 34-day period.

[4a] A single "switch", as we employ that term here, involves one or more fund redemption transactions coupled with one or more related fund purchase transactions.

account for a relatively brief period of time. The funds that were sold to effect switches represented an aggregate investment by the nine customers involved of about $1,477,000 and had been acquired in 135 transactions, including reinvestments of dividends. Of those amounts about $542,000 in mutual fund shares or 37% acquired in 23 transactions had been held in the accounts less than a year before being sold; about $431,000 or 29% acquired in 47 transactions had been held between one and two years; about $414,000 or 28% acquired in 54 transactions had been held between two and three years; and only about $90,000 or 6% acquired in 19 transactions had been held more than three years.[5]

Moreover the redemptions of mutual fund shares purchased by the nine customers during the five-year period involved, including sales not followed by a switch to another fund's shares, reflect an over-all pattern of selling after relatively short periods of retention in the customers' accounts. Of the total of approximately $2,692,000 in mutual fund shares purchased from registrant in 195 transactions, about $959,000 or 36% acquired in 55 transactions were resold within one year; about $671,000 or 25% acquired in 59 transactions were resold between one and two years; about 194,000 or 7% acquired in 19 transactions were resold between two and three years; and about $22,000 or 1% acquired in 8 transactions were resold after three years. Of the remaining approximately $846,000 acquired in 57 purchases and

[5] The breakdown of the 135 transactions totals more than 135 because in a few instances portions of a single purchase of mutual fund shares were sold at different times.

held in the accounts at the end of the period, more than $610,000 had been acquired in 42 purchases within the preceding two years.[6]

Switches accounted for $65,593 of registrant's commissions from the nine accounts, or over one-half of its gross commissions from those accounts during the period in question. In every case the switching of investments resulted in a reduction in the profits which the customer otherwise would have made. Thus, the accountant was $32,162 worse off as a result of switches in his account as of January 7, 1957 than if no switches had been effected.[7] Of the total commissions of $7,488 realized by registrant on purchases in this account, $7,012 was attributable to switching. One of the farmer-customers would have been $13,805 better off at the end of the period if there had been no switches in his account. Of registrant's total commissions of $7,365 on purchases in this account, $6,300 was attributable to switches. The other customers would also have fared better by substantial amounts absent switches. Registrant's commissions from their accounts attributable to switching ranged from $1,468 to $11,237.

Registrant's policy of switching his customers from one mutual fund security to another was highly profitable to himself and detrimental to his customers. The sales commission or load paid by these customers on the purchase of mutual fund shares was considerably higher

[6] In three instances portions of the same purchase were resold in different periods.

[7] The figure of $32,162 was arrived at by deducting the value of the account as of January 1957 plus dividend and capital gain distributions during the period, from what the corresponding total would have been absent switching. The account was not sufficiently active during the balance of the period under consideration to warrant any conclusions with respect to it.

than they would normally pay on the purchase of other securities; the commissions often ran as high as 8¾% of the offering price and included a dealer commission for registrant of as much as 6% of the offering price.[8] We pointed out the unsoundness of a practice of switching from one mutual fund to another in *Thomas Arthur Stewart*: [9]

> "In view of the selling load included in the purchase price, in-and-out trading in the subject (mutual fund) shares could be profitable only (a) if a purchase were followed by a market appreciation of the portfolio or an increase in the fund's net current assets *sufficient to exceed the selling load of 8 per cent to 9½ per cent*, or (b) if a redemption were followed by an equivalent recession and subsequent repurchase. In switches from one trust to another in simultaneous purchases and redemptions, the very diversification of the trust portfolios decreased the likelihood that any marketwise benefit would be gained by the customers, since they were continuously in the market, yet repeatedly paying substantial selling loads. Increased activity in the customers' accounts increased Stewart's commissions but decreased the customers' chances for profit."

Yet registrant admitted that he had employed mutual funds as a "trading vehicle" or "for managing the accounts of my customers, considering their tax liability and bracket." Moreover, in the only case where

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[8] See Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Part Two, Chapter III, p. 221 (1940); "The nature of open end companies and fixed trusts, particularly their obligation to redeem their shares or certificates at asset value, has made their securities vulnerable to 'switching' operations, i.e., attempts by dealers to persuade customers to sell the shares of one investment company and to use the proceeds to buy those of another. Distributors, dealers, and salesmen, profited from each sale of an investment company issue, whether the sale involved the investment of additional funds by a customer or merely his liquidation of one issue to buy another. Such operations may, however, be costly to investors since they involve the payment of a new load on each shift."

[9] 20 S.E.C. 196, 201-202 (1945).

registrant attempted a specific explanation of a sale assertedly made for tax advantages, it was clear that the savings in taxes were far outweighed by the amount of sales load the customer paid in reinvesting the proceeds of the sale.[10]

Registrant's other explanations for certain of the switches were that he had lost confidence in the management of the fund or that he believed that the asset value of a fund specializing in stocks of a particular industry would decline. In view of the number of switches and the nature of mutual funds we are not persuaded by these reasons. Having engaged exclusively in the sale of mutual fund shares for many years, registrant must have been aware of the disadvantage to his customers in paying successive large sales loads. While an occasional switch from a fund of one type to that of another might have been justified in a particular situation, the volume of switching evidenced in this case cannot be explained on the basis of the considerations advanced by registrant.[11] We conclude, as did the hearing examiner, that registrant, together with or aided and abetted by his son with respect to the accountant-customer transactions, willfully violated the anti-fraud provisions of Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and

[10] In this case, which involved the widow-customer, registrant on December 31, 1953, without any advance authorization from her, liquidated in her account a total of $22,807 in shares of two mutual funds at a loss of $3,507 to offset a capital gain of $3,148 in her account. On January 4, 1954, registrant sold shares of three mutual funds to her for $22,742, including a sales load of $1,933 of which registrant received $1,364 as his commission. The tax saving to the customer was only about $600.

[11] Of the approximately 65 switches, involving one or more purchase transactions, which were effected by registrant, 14 were mostly from funds apparently specializing in a particular industry to other specialized funds, 10 from specialized to general funds, 17 from general to specialized funds, and 24 from general to general funds.

Rules 17 CFR 240.10b-5 and 15c1-2 thereunder.[12]

SALES AT PRICES ABOVE OFFERING PRICE

Registrant effected sales of mutual fund shares to two customers at prices which, because of the failure to reduce the sales load as provided by the prospectus on purchases at or above a $25,000 break point, were in excess of the current offering price for such purchases. On February 17, 1954, registrant sold a total of $28,145 of two series of a mutual fund to one of the farmer-customers and $27,167 of the same two series to the farmer who had given registrant financial assistance. Under the prospectus, since the combined purchases of each of those customers exceeded $25,000, they were entitled to, but did not receive, a reduction in the sales load from 8½% to 6%. Consequently, these customers paid a total of $1,380 in excess sales charges and registrant received more than $800 in commissions to which he was not entitled.[13]

We agree with the hearing examiner that registrant, in effecting these sales, willfully violated the anti-fraud provisions designated above.

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[12] See R. H. Johnson Co., supra; Looper and Company, supra.

[13] Registrant placed two lumped orders for the shares of the two series without specifying that two customers were each purchasing shares in each series in a total amount exceeding the break point. Under the dealer agreement between the underwriter and registrant, it was the latter's responsibility to inform the underwriter that the two customers were entitled to a break-point concession. Thereafter, registrant sent drafts to the underwriter in payment for the shares and disclosd the names of the purchasers and the amount of the shares purchased by each, but he did not then claim and the customers have not received the break-point concession. It was stated at the hearings that neither the fund, nor registrant upon advice of counsel, had refunded the excess of the sales charges to the customers but that registrant would do so upon the completion of these proceedings. The two customers have assertedly been advised of registrant's promise.

SALES BELOW BREAK POINTS

Registrant recommended to customers that they purchase, and he sold to such customers, mutual fund shares in amounts slightly below break point at which a reduced sales load was available. Registrant also sold fund shares to customers in several transactions within a short time or to different members of a customer's family at the same time, with each sale being in an amount below the break point, although the aggregate amount exceeded the break point. Thus in March 1951 and October 1952, registrant effected sales to two of the farmer-customers in amounts of $23,661 and $24,000, respectively, although the break point in each case was $25,000. It appears that these customers were financially in a position to make the small additional investments necessary to attain the benefit of break-point pricing. Had such additional purchases been effected they would have saved a total of $1,176 in sales charges, and registrant's commission would have been reduced by a total of $609. Similarily, on August 3 and 23, 1950, registrant sold to one of the farmer-customers at the maximum sales load a total of $30,820 of shares of a mutual fund, with each purchase amounting to less than the $25,000 break point. If these purchases had been combined, the customer's sales load would have been over $900 less, and registrant's commissions over $600 less. Also, registrant and his son sold shares of a mutual fund to the accountant-customer for $16,607 on January 4, 1951, and for $5,272 a week later. Had the customer combined the purchases and invested an addi-

tional $3,121 in the fund to reach the $25,000 break point, he would have saved $750 in sales load and registrant's commissions would have been reduced by $500.

On June 7, 1954, registrant sold one series of a mutual fund to one of the farmer-customers for $19,340, and two days later sold two additional series of that fund to him for $9,744. Under the terms of the prospectus, if these sales had been made at the same time the customer would have saved $727 in sales charges while registrant's commissions would have been reduced by more than $400. In addition, on January 7, 1955, registrant sold $16,538 of shares of a mutual fund to the same customer and $10,779 of shares of the same fund to the customer's son. Under the terms of the prospectus, such purchases by members of an immediate family could have been combined and thereby exceeded the break point, with a consequent savings to the father and son in sales charges of about $400 and a reduction of about $320 in registrant's commissions.

Registrant claims that break points were always disclosed to customers. The record indicates, however, that at least in some instances registrant failed to disclose or disclosed only after the transactions had been effected that substantial savings would have been available to these customers if additional shares had been purchased or purchases had been combined to equal or exceed the break point amount. In none of the instances set forth does it appear that adequate disclosure was

made prior to the transaction.[14] We agree with the hearing examiner that respondents' conduct in the above respects constituted further willful violations of the designated anti-fraud provisions.

PUBLIC INTEREST

Notwithstanding the serious nature of the violations found by the hearing examiner, he concluded that the public interest did not require revocation of registrant's registration because of the length of time that had elapsed since the hearings were closed in September 1959 and the "presumption," which he considered to exist in the absence of information in the record to the contrary, that registrant's conduct had been good during the interval.[15]

On December 12, 1963, we denied respondents' motion for a permanent stay or dismissal of the proceedings and we rejected respondents' contention that they had been denied due process as a result of the lapse of time after the conclusion of the hearings. We noted at that time that the hearings had been closed subject to the filing by either side of any depositions of then unavailable witnesses, that several depositions were filed between December 1959 and April 1961 and that, at the

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[14] A broker-dealer fiduciary's affirmative duty to make adequate disclosure under these circumstances is not satisfied by merely furnishing the customers with a prospectus which describes the break points. Mason, Moran & Co., 35 S.E.C. 84, 90 (1953).

[15] The hearing examiner also stated that the delay in bringing the case to the decisional stage deprived him of the opportunity of passing upon the credibility of the witnesses and that the record was "stale." However, in view of the generally sympathetic attitude toward registrant evidenced by the testimony of the investor-witnesses and the importance of the documentary evidence in the record, we do not consider the credibility of witnesses to be a controlling factor. Moreover, the "staleness" of a record only affects the weight of the evidence and ordinarily does not even require that the record be reopened. Southern Railway Company v. U.S., 180 F. Supp. 189, 192-193 (E.D. Va., 1959). See also I.C.C. v. Jersey City, 322 U.S. 503, 515 (1944).

instance of registrant, negotiations for a settlement were held between April 1961 and August 1962. Those negotiations were followed by discussions regarding a proposed amendment to the order for proceedings to extend the period of the alleged violations. In the summer of 1963 the proposed introduction of supplementary exhibits, which recapitulated evidence already in the record and which the staff asserted were prepared as a convenience to and at the request of registrant, was discussed by the parties. In August 1963 registrant refused to stipulate the admission of those exhibits. Thereafter, the staff moved to introduce these exhibits in evidence and close the record. The hearing examiner denied those motions in October 1963 and the following month registrant moved to dismiss the proceedings. In denying the motion we concluded that registrant was not prejudiced by the delay because the proceedings were private and registrant had not been prevented from doing business, and we noted that no proof of financial hardship resulting from the delay had been offered by registrant. We further indicated that registrant had failed to request the hearing examiner to schedule posthearing procedures immediately after the last deposition was filed in April 1961 or at any subsequent time.

We do not agree with the hearing examiner that respondents are entitled to a presumption that their conduct has been good since the close of the hearings *because the record is silent as to such conduct.* The decisions on which the hearing examiner relied are not

applicable.[16] The nature of *the violations found and the fact that* similar violations by registrant *were found in an earlier proceeding belie* such a presumption. In the earlier proceeding, which was instituted before the NASD in January 1955, registrant was found, among other things, to have switched mutual fund investments in the accounts of 12 customers from 1943 to 1954, including apparently seven of the customers involved in the instant proceedings (the physician, accountant, widow, and four farmers), and registrant was suspended for 15 days and fined $3,000. That decision was initially rendered by a District Committee in May 1955 and affirmed by the Board of Governors in October 1955, yet registrant, as shown above, continued his switching activities.[17]

We, have carefully reviewed our previous ruling and the hearing examiner's recommendation. As we have seen, respondents were not prejudiced by the lapse of time to which they contributed,[18] and they failed to take any steps to expedite the proceedings. The long

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[16] **Howard F. Hansell, Jr.**, 31 S.E.C. 393 (1950), and **Herbert A. Mendell**, 31 S.E.C. 491 (1950), were broker-dealer denial proceedings involving the issue whether it was appropriate in the public interest to deny registration on the basis of an injunction entered 10 years previously in one case and 12 years previously in the other. On the issue of public interest, evidence was adduced with respect to the applicant's conduct since the injunctions were issued, and the Commission concluded that under all the circumstances, including the lapse of time since the injunctions and applicants' apparent good record in the interim, registration should be permitted. In **Wesrab Oil Company**, Securities Act Release No. 4647 (September 30, 1963), a Regulation A suspension proceeding under the Securities Act of 1933, the notification failed to disclose that the president of the issuer had been enjoined from engaging in certain securities activities 23 and 25 years prior to the filing. The Commission vacated the temporary suspension order on the grounds, among others, of the lapse of time and the president's good record. The distinguishing feature between those cases and the instant case is that there is no evidence in the record pertaining to respondents' conduct subsequent to the violations and the hearings thereon.

[17] The NASD also found violations by registrant of the credit provisions of Section 11(d)(1) of the Exchange Act and Regulation T promulgated under that Act by the Board of Governors of the Federal Reserve Board.

[18] C.f. **N.L.R.B. v. Pool Manufacturing Co.**, 339 U.S. 578, 580 (1949). See **Transamerica Corporation**, 10 S.E.C. 454, 456-59 (1941), where we denied a similar motion to dismiss, where the delay was caused in part by numerous conferences between representatives of the respondent and the staff held in an effort to simplify and expedite the proceedings.

time which it took to complete this proceeding was unfortunate and the Commission is making every effort to prevent delay in its enforcement of the Federal securities laws. Such delay, however, does not require that a proceeding be dismissed.[19] Under the circumstances and in light of the seriousness of the violations found here, we believe that dismissal is not warranted and the public interest requires the imposition of a sanction.[20]

In determining the extent of any sanction to be imposed, we have taken into account not only the fraudulent conduct of registrant over a period of years but also the fact that *registrant was on notice* of the serious nature of the practice of switching customers from one mutual funds to another by virtue of the *prior NASD proceedings and findings against him.*

On the basis of the foregoing, we conclude that it is appropriate in the public interest to revoke registrant's broker-dealer registration and expel him from membership in the NASD. We further conclude that Irish, Jr. should be found a cause of such revocation and expulsion.

Accordingly, IT IS ORDERED that the registration as a broker and dealer of Russell L. Irish, doing business as Russell L. Irish Investments, be, and it hereby is, revoked, and that he be, and he hereby is, expelled from membership in the National Association of Securi-

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[19] See Costello v. United States, 365 U.S. 265, 281-84 (1961).

[20] See Deering Milliken, Inc. v. Johnston, supra, at pp. 867-69; "Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings," 72 Yale L.J. 574, 583-86 (1963).

ties Dealers, Inc.; and it is found that Russell Lawson Irish is a cause of this order.

By the Commission (Chairman COHEN and Commissioners WOODSIDE, OWENS, BUDGE and WHEAT).

Orval L. DuBois, Secretary.

APPENDIX A

Excerpt from page one, Findings, Opinion and Order etc.

(Securities Exchange And Release No. 7718)

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

October 5, 1965

In the Matter of the Application of
RUSSELL L. IRISH
Old National Bank Building
Spokane, Washington
and
RUSSELL LAWSON IRISH
For Review of Disciplinary Action Taken
by the
NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC.
File No. 16-1A181
Securities Exchange Act of 1934—
Section 15A(g) and 15A(h)

FINDINGS, OPINION AND ORDER MODIFYING ACTION OF REGISTERED SECURITIES ASSOCIATION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDINGS

Violations of Rules of Fair Practice

Improper Arranging for Extension or Maintenance of Credit

PUBLIC INTEREST

Under Section 15A(h)(2) of the Act, we must determine with due regard to the public interest whether the penalties imposed upon applicants are excessive or oppressive.

In assessing those penalties, the NASD noted that in 1955 it had also found the member to have engaged in violations of Section 11(d)(1) of the Act and Regulation T. However, we have set aside several of the NASD's adverse findings and have found only that the member arranged for the extension of credit to one customer. Under these circumstances, the sanctions and costs assessed with respect to the member are excessive and must be reduced, and those with respect to the member's son must be cancelled. Upon consideration of the nature and limited extent of the violation found against the member, we have determined that the penalties consisting of the 30-day suspension and the $5,000 fine should be reduced to censure and that, since costs should not be disproportionate to the direct sanctions imposed,[11] the costs of $2,310.95 should be reduced to $500.

Accordingly, IT IS ORDERED that the 30-day suspensions of Russell L. Irish's membership in the National Association of Securities Dealers, Inc. and of Russell Lawson Irish's registration as a registered representative, and the fine of $5,000 imposed upon them jointly

[11] See Boren & Co., 40 S.E.C. 217, 230-31 (1960).

by the Association be, and they hereby are, cancelled; that Russell L. Irish be, and he hereby is, censured; and that the costs of $2,310.95 be, and they hereby are, reduced to $500 and assessed only against Russell L. Irish.

By the Commission (Chairman COHEN and Commissioners WOODSIDE, OWENS, BUDGE, and WHEAT).

Orval L. DuBois, Secretary.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSELL L. IRISH, dba RUSSELL L. IRISH INVESTMENTS,
Petitioner,

vs.

SECURITIES & EXCHANGE COMMISSION,
Respondent;

No. 20,472

(October 19, 1966)

On Petition to Review an Order of the Securities & Exchange Commission

Before: MADDEN, Judge of the United States Court of Claims, and KOELSCH and BROWNING, Circuit Judges.

MADDEN, Judge:

This is a petition to review an order of the Securities and Exchange Commission revoking the registration as a broker and dealer in securities of Russell L. Irish, expelling him from membership in the National Association of Securities Dealers, Inc., and naming Russell Lawson Irish, Mr. Irish's son whom he employs as a salesman, as a cause of that revocation and expulsion.[1]

[1] Russell Lawson Irish is also a petitioner and joins in the contentions made by his father. Petitioners are referred to herein collectively as "Mr. Irish".

The SEC entered the order on August 27, 1965, pursuant to sections 15(b) and 15A of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b) and 78o-3. Jurisdiction of this court is based on section 25(a) of the Securities Exchange Act, 15 U.S.C. 78y(a).

Mr. Irish contends (1) the Commission's findings are not supported by substantial evidence; (2) the Commission by unduly delaying the proceedings violated its own Rules of Practice and the Administrative Procedure Act; (3) the Commission's delay deprived Mr. Irish of "due process of law." We consider these contentions in order.

Upon consideration of the record and the briefs and arguments of counsel, we conclude the record contains substantial evidence to support the Commission's findings that Mr. Irish advanced his own interests to the detriment of his customers by making excessive trades in mutual funds ("churning"), charging excessive commissions, and making sales to customers at prices just below the minimum break points.

On the issue of delay, the record shows that proceedings were commenced on March 19, 1959, and that hearings on the charges against Mr. Irish were held on four days commencing September 21, 1959. The evidence at the hearing covered the years 1950 through 1958 and together with the documentary evidence showed serious, wilful misconduct. Between December 3, 1959, and April 5, 1961, several depositions were taken and filed, by stipulation.

Substantially nothing further occurred until October 14, 1963, when the SEC moved to reconvene the hearings. The hearing examiner, thinking the Commission barred by doctrines of laches and by "the concepts of fairness and due process," refused to reopen a case which had "been in such an inactive and dormant condition for so long." He issued an order recommending that the proceedings against Mr. Irish be dismissed.

The succeeding months saw motions, briefs, and arguments placed before the Commission, and a petition for reveiew before this court (which this court dismissed).

Thereafter, on August 27, 1965, the SEC issued its order overruling the hearing examiner and revoking Mr. Irish's registration. The present petition to review this order was then filed in this court.

We find that none of the delays now entitle Mr. Irish to a dismissal of the charges and restoration of his broker-dealer registration.

We do not understand Mr. Irish to argue upon the first delay between his defrauding his customers (1950-1958) and the SEC's filing the charges (March 19, 1959). Compare *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 623-24 (1953); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 151, 226 (1940).

As for the second delay, from the last hearing (September 24, 1959) until the last deposition (April 5, 1961), Mr. Irish cannot complain after having stipulated at the time to the taking of the depositions. *Compare*

Stearns Co. v. United States, 291 U.S. 54, 61-62 (1934).

As for the further delays, from the last deposition (April 5, 1961) to the SEC's motion to reconvene the hearing (October 14, 1963), to the denial of the motion (April 3, 1964), to the issuing the revocation order (August 27, 1965), we find in them no cause for relief under sections 6(a)[2] and 10(e)[3] of the Administrative Procedure Act or under the "due process" clause of the Constitution, for two reasons.

First, Mr. Irish had failed completely to show how the Commission caused him prejudice by waiting until 1965 to revoke his registration. *Compare Costello v. United States*, 365 U.S. 265, 281-84 (1961); *Buatte v. United States*, 350 F.2d 389, 394 (9th Cir. 1965). Boiled down, his argument is that early revocation would have left him the early 1960's to mend his fences, so that by now, he could have applied, successfully, for reinstatement.

The argument is specious. Mr. Irish may apply for reinstatement now. If in 1959 he stopped defrauding his customers (and the record is silent), he will have improved his case before the Commission.

Second, Mr. Irish did not contest the Commission's delay until the Commission moved (on October 14, 1963), to reconvene the hearing. He could have earlier petitioned a court to compel the Commission to expedite its proceedings. Administrative Procedure Act, sections

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[2] Section 6(a) provides in part: "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it . . ." U.S.C. 1005(a).

[3] Section 10(e) provides in part: "It (the reviewing court) shall (A) compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 1009(e).

6(a) and 10(e), supra. *Compare Deering Millikin, Inc. v. Johnston*, 295 F.2d 856, 861-64 (4th Cir. 1961), *with FTC v. J. Weingarten, Inc.*, 336 F.2d 687, 691-92 (5th Cir. 1964). But he might have been expediting the demise of his business. Perhaps that is why he asked the Commission (in October of 1963) for an outright dismissal, rather than a speedy decision on the merits. Mr. Irish, like the litigant who complained before the United States Supreme Court of the NLRB's delaying two and a half years before enforcing one of its orders, and "who could have obtained review of the Board's order when it was entered," "is hardly in a position to object." *NLRB v. Pool Mfg. Co.*, 339 U.S. 577, 581 (1951).

As to whether the Administrative Procedure Act further permits a court to dismiss the agency proceedings altogether, as argued by Mr. Irish, we express no opinion. *Compare Texaco, Inc. v. FTC*, 336 F.2d 754, 763 (D.C. Cir.), *with FTC v. Texaco, Inc.*, 381 U.S. 739, 740 (1965).

The other contentions of Mr. Irish are without merit. Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSELL L. IRISH, dba
RUSSELL L. IRISH INVESTMENTS,
Petitioner

vs.

SECURITIES AND EXCHANGE COMMISSION
Respondent

No. 20472

DECREE

Before: MADDEN, Judge of the U. S. Court of Claims, and KOELSCH and BROWNING, Circuit Judges

This cause came on to be heard upon the petition of Russell L. Irish, filed October 21, 1965, to review an order of the Securities and Exchange Commission entered August 27, 1965. The Court heard arguments of respective counsel on October 6, 1966, and has considered the briefs filed in this case.

On consideration whereof and pursuant to the opinion of this Court, rendered and filed October 19, 1966, IT IS ORDERED, ADJUDGED AND DECREED by this Court that the order of the said Securities and Exchange Commission of August 27, 1965, be and hereby is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, November 25, 1966

Before: MADDEN, Judge of the United States Court of Claims and KOELSCH and BROWNING, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of the appellant filed November 15, 1966 and within time allowed therefor by rule of court, for a rehearing of the above cause be, and hereby is denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 897

RUSSELL L. IRISH, d/b/a RUSSELL L. IRISH, INVESTMENTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 59-63) is reported at 367 F. 2d 637.[1] The findings and opinion of the Securities and Exchange Commission

[1] References to the Appendix of the Petition for a Writ of Certiorari are cited "Pet. App." References to the 14 volume record below, which petitioner has filed with the Court, are cited "R."

(Securities Exchange Act Release No. 7687), dated August 27, 1965 (Pet. App. 39-55), are unreported.

JURISDICTION

The judgment of the court of appeals denying a petition for rehearing was entered on November 25, 1966. The petition for a writ of certiorari was filed on December 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the findings of the Securities and Exchange Commission of wilful violations of the securities laws by petitioner were supported by substantial evidence.

2. Whether petitioner's rights were violated by the revocation of his registration as a broker and dealer in securities where, although there was a four-year interval between the conclusion of the evidentiary hearings and the scheduling of proposed findings and briefs, petitioner never sought to expedite the proceedings, contributed substantially to the delay, and has shown no prejudice resulting therefrom.

STATUTES INVOLVED

The relevant provisions of the Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. 77a, *et seq.*, the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a, *et seq.*, and Rules under the Securities Exchange Act of 1934, 17 CFR 240.0-1, *et seq.*, are set forth in the Appendix, *infra*, pp. 12-16.

STATEMENT

On August 27, 1965, the Securities and Exchange Commission issued its findings, opinion and order (Pet. App. 39-55), pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934, 15 U.S.C. 78*o*(b) and 78*o*-3, revoking petitioner's registration as a broker and dealer in securities and expelling him from membership in the National Association of Securities Dealers, Inc. ("NASD") (Pet. App. 54-55). The Commission found that petitioner had violated the antifraud provisions of the federal securities laws[2] in that (1) petitioner had "churned" customers' accounts (*i.e.*, engaged in unwarranted buying and selling in order to increase commissions) by "switching" customers from one mutual fund to another (Pet. App. 42-48);[3] (2) petitioner had purchased mutual fund shares for customers in amounts just under minimum "break points" (Pet. App. 49-51);[4] and (3) petitioner had

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[2] Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q (a); Sections 10(b) and 15(c)(1) of the Securities Exchange Act, 15 U.S.C. 78j(b) and 78*o*(c)(1), and Rules 10b-5 and 15c 1-2 thereunder, 17 CFR 240.10b-5 and 15c 1-2.

[3] "Switching" is the term usually applied to the churning of customers' accounts where mutual fund shares are involved. For a description of "churning" see *Norris & Hirshberg, Inc.* v. *Securities and Exchange Commission*, 177 F. 2d 228, 232 (C.A. D.C.). See also *Report of Special Study of Securities Markets of the Securities and Exchange Commission*, H.R. Doc. 95, 88th Cong., 1st Sess., Pt. 4 at p. 151 (1963).

[4] "Break points" are the quantities at which quantity discounts as to sales charges became available to purchasers of mutual fund shares. For example, in one of the funds here

effected sales of mutual fund shares to two customers at prices in excess of the public offering price (Pet. App. 48). These findings of fact, characterized by the court of appeals as the advancement of petitioner's "own interests to the detriment of his customers," (Pet. App. 60) were in accord with the findings in the hearing examiner's Recommended Decision (Pet. App. 34) and were held by the court of appeals to be supported by substantial evidence (Pet. App. 60).

The court of appeals also rejected petitioner's contentions that certain delays in the proceeding had violated the Commission's Rules of Practice and the Administrative Procedure Act and had deprived petitioner of due process of law (Pet. App. 60-63). The court noted that private proceedings had been commenced on March 19, 1959, and that hearings had been held on four days beginning September 21, 1959. It found that the "evidence at the hearing covered the years 1950 through 1958 and together with the documentary evidence showed serious, wilful misconduct" (Pet. App. 60).[5] It also

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involved on purchases of shares from $1 to $24,999 the purchaser pays an 8½% sales charge, which includes a commission to the dealer of 6%; on purchases from $25,000 to $49,999 the sales charge is reduced to 4%. Prospectus of National Securities Series of July 27, 1953, Commission Public File No. 2-10347-1.

[5] Petitioner states (Pet. 13) that the "instant proceedings covered a period from 1941 to the time of the 1959 hearing." The earliest transaction analyzed by the Commission, however, was in 1950 (Pet. App. 49) and with respect to the

noted, "Between December 3, 1959, and April 5, 1961, several depositions were taken and filed, by stipulation" (Pet. App. 60). The court did not point out, as the Commission did (Pet. App. 52), that between April 1961 and October 1963 the parties engaged in extensive but unfruitful negotiations on a variety of questions. In October 1963 the Commission's Division of Trading and Markets moved to reconvene the hearing to introduce certain exhibits and to have the hearing examiner prescribe a time schedule for the filing of proposed findings and briefs. Not until that motion was denied by the hearing examiner on the grounds of laches and lack of due process did the petitioner move to dismiss the proceeding (Pet. App. 52; R. 1161).

The court below noted that the "succeeding months [following the motion to reconvene] saw motions, briefs, and arguments placed before the Commission, and a petition for review before this court (which this court dismissed)" (Pet. App. 61). By order dated December 12, 1963, the Commission overruled the hearing examiner, denied petitioner's motion to dismiss the charges, determined that the proceeding be deemed closed, and directed that, as preparatory steps to the filing of a recommended decision by the hearing examiner, the parties should file proposed findings and supporting briefs (R. 1162). Petitioner had never requested the hearing examiner to schedule the filing of proposed findings and briefs (R. 1159; Pet. App. 52).

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churning violations the Commission only analyzed the period 1953-1958 (Pet. App. 42).

ARGUMENT

The court of appeals' affirmance of the Commission's order was clearly correct, and the petition presents no question warranting further review.

1. Both the hearing examiner and the Commission found that petitioner had engaged in willful violations of the antifraud provisions of the federal securities laws. The court below held that these findings were supported by substantial evidence. Petitioner nevertheless urges (Pet. 3, 13) that the determination of the court below was erroneous in light of the hearing examiner's statement in his recommended decision that he was at a disadvantage in evaluating the credibility of witnesses because of the delay in the proceeding (Pet. App. 25). The Commission noted, however, that it did not "consider the credibility of witnesses to be a controlling factor" in light of "the importance of documentary evidence in the record," even accepting the testimony of investor-witnesses who were "generally sympathetic" to petitioner (Pet. App. 51, n. 15).[6]

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[6] Petitioner is mistaken in suggesting (Pet. 13) that proof of "evil intent" is required to establish willfulness in a proceeding to determine whether the registration of a broker and dealer should be revoked. *Tager* v. *Securities and Exchange Commission*, 344 F. 2d 5, 8 (C.A. 2); *Gilligan, Will & Co.* v. *Securities and Exchange Commission*, 267 F. 2d 461, 468 (C.A. 2), certiorari denied, 361 U.S. 896; *Norris & Hirshberg, Inc.* v. *Securities and Exchange Commission*, 177 F. 2d 228 (C.A.D.C.); *Hughes* v. *Securities and Exchange Commission*, 174 F. 2d 969, 977 (C.A.D.C.).

Petitioner is also mistaken in contending (Pet. 13) that

Furthermore, the hearing examiner stated that he was "convinced by a preponderance of the evidence" that the violations occurred (Pet. App. 34). The disagreement between the hearing examiner and the Commission related to the remedy—*i.e.*, whether petitioner's registration should be revoked. The hearing examiner believed that revocation was not in the public interest in light of the delays in the proceeding and because, in the absence of contrary evidence in the record, he presumed that petitioner had "mended his ways" since the close of the hearings in 1959 (Pet. App. 35-36). The Commission found (1) that, considering the privacy of the proceedings, petitioner had not been "prejudiced by the delay" to which he had contributed, and (2) that he was not entitled to any presumption of good conduct in view of the nature of his violations and the fact that he had previously been found to have committed similar violations in an earlier proceeding before the NASD involving churning violations in the years 1943 to 1954 (Pet. App. 52-53). The Commission concluded that "the public interest requires the imposition of a sanction" (Pet. App. 54). The appropriateness of

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revocation proceedings are quasi-criminal. Such proceedings have been uniformly held to be remedial and not penal. See *e.g.*, *Tager* v. *Securities and Exchange Commission*, 344 F. 2d 5, 8-9 (C.A. 2); *Berko* v. *Securities and Exchange Commission*, 316 F. 2d 137, 141 (C.A. 2); *Blaise D'Antoni & Associates, Inc.* v. *Securities and Exchange Commission*, 289 F. 2d 276 (C.A. 5); *Pierce* v. *Securities and Exchange Commission*, 239 F. 2d 160, 163 (C.A. 9); *Wright* v. *Securities and Exchange Commission*, 112 F. 2d 89, 94 (C.A. 2).

the remedy in terms of the public interest is, of course, a policy determination within the Commission's discretion which should be disturbed only if it "lacks any rational and statutory foundation." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207. See also *American Power and Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 112-113. Cf. *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 364.

2. Petitioner contends that the delay in the proceeding violated Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009(e), subsequently recodified as 5 U.S.C. 706), which authorizes a reviewing court to compel agency action "unreasonably delayed," and deprived him of due process of law (Pet. 2-5, 10, 12). As the court below held, however, petitioner "failed completely to show how the Commission caused him prejudice by waiting until 1965 to revoke his registration" (Pet. App. 62). Indeed, petitioner "did not contest the Commission's delay until the Commission moved (on October 14, 1963), to reconvene the hearing." Citing Sections 6(a) and 10(e), of the Administrative Procedure Act (5 U.S.C. 1005(a) and 1009(e), subsequently recodified as 5 U.S.C. 555(b) and 706), the court pointed out that, although petitioner "could have earlier petitioned a court to compel the Commission to expedite its proceeding," he did not do so (Pet. App. 62-63). Further, as the Commission found, the proceedings were private, petitioner was not prevented from doing

business during the pendency of the proceeding, he offered no proof of financial hardship and he contributed to the delay (Pet. App. 52-53). Cf. *Costello* v. *United States*, 365 U.S. 265, 281-284.

Petitioner's subsidiary contention that due process was denied because the Commission violated its own rules is also without merit, as the court of appeals found. The Commission held that Rule 13 of the Commission's Rules of Practice, 17 CFR 201.13, governing adjournments of hearings,[7] did not apply because it "was not adopted by the Commission until after the hearing was closed in 1959 subject to the filing of depositions, and no adjournment was ordered by the Hearing Examiner following the filing of the last deposition in April 1961, when such limitation was in effect" (R. 1162).[8]

Similarly, Rule 16(e) of the Commission's Rules of Practice, 17 CFR 201.16(e),[9] providing for the scheduling of proposed findings and briefs, did not become effective until October 1, 1960,[10] after the evidentiary hearing had been closed. At no time did petitioner request the hearing examiner to schedule the filing of proposed findings and conclusions.

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[7] The text of Rule 13 is set forth at Pet. 6-7.

[8] Rule 13 was adopted as a part of a general revision of the Commission's Rules of Practice and did not become effective until October 1, 1960, 25 Fed. Reg. 6719, 6732.

[9] The text of Rule 16(e) is set forth at pages 5-6 of the Petition.

[10] 25 Fed. Reg. 6719, 6733 (1960).

3. Petitioner also contends (Pet. 4, 8-9) that the Commission acted arbitrarily and denied due process when it entered the revocation order in the present proceeding, and shortly thereafter, in an independent proceeding, substantially reduced sanctions which had been imposed on petitioner by the National Association of Securities Dealers in a disciplinary action in which petitioner had been charged, *inter alia*, with churning in the years 1956 through 1963.[11] This contention is frivolous. In the NASD appeal the Commission held that the question of churning was not properly before the NASD's Board of Governors and that the Board could properly have considered only violations of the extension-of-credit provisions of Regulation T under the Securities Exchange Act. Since the Commission made no determination on the merits of the charges of churning in the NASD proceeding (see Pet. App. 56), its reduction of the penalty in that proceeding is in no way inconsistent with the sanction it imposed in the instant case.

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[11] *Russell L. Irish* (Securities Exchange Act Release No. 7718, October 5, 1965).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1967.

APPENDIX

STATUTES INVOLVED

1. The Securities Act of 1933 (48 Stat. 74, as amended, 15 U.S.C. 77a, *et seq.*) provides in pertinent part:

FRAUDULENT INTERSTATE TRANSACTIONS

SEC. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * * * * *

2. The Securities Exchange Act of 1934 (48 Stat. 881, as amended, 15 U.S.C. 78a, *et seq.*) provides in pertinent part:

MANIPULATIVE AND DECEPTIVE DEVICES

SECTION 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails,

or of any facility of any national securities exchange—

* * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * * * *

OVER-THE-COUNTER MARKETS

SECTION 15. * * * *

(b) * * * *

(5) The Commission shall, after appropriate notice and opportunity for hearing, by order * * * revoke the registration of, any broker or dealer if it finds that such * * * revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—

* * * * *

(D) has willfully violated any provision of the Securities Act of 1933, or of the Investment Advisers Act of 1940, or of the Investment Company Act of 1940, or of this title, or of any rule or regulation under any of such statutes.

* * * * *

(c) (1) No broker or dealer shall make use of the mails or of any means or instrumentality of inter-

state commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent.

* * * *

SECTION 15A. * * * *

* * * *

(*l*) The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or for the protection of investors or to carry out the purposes of this section—

* * * *

(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a registered securities association any member thereof, or to suspend for a period not exceeding twelve months or to bar any person from being associated with a member thereof, if the Commission finds that such member or person—

(A) has violated any provision of this title or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provision of this title or any rule or regulation thereunder.

(B) has willfully violated any provision of the Securities Act of 1933, as amended,

or of any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of such Act or rule or regulation.

* * * *

RULES UNDER THE SECURITIES EXCHANGE ACT OF 1934, 17 CFR 240.0-1, ET SEQ.

* * * *

Rule 10b-5, 17 CFR 240.10b-5. Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

() To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

* * * *

Rule 15c 1-2, 17 CFR 240.15c 1-2. Fraud and misrepresentation.

(*a*) The term "manipulative, deceptive, or other fraudulent device or contrivance," as used in section 15(c)(1) of the Act, is hereby defined to include any

act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

(*b*) The term "manipulative, deceptive, or other fraudulent device or contrivance," as used in section 15(c)(1) of the Act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading.

(*c*) The scope of this section shall not be limited by any specific definitions of the term "manipulative, deceptive, or other fraudulent device or contrivance" contained in other rules adopted pursuant to section 15(c)(1) of the Act.

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